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Docket Management Facility
U.S. Department of Transportation
400 Seventh Street SW
Washington, DC 20590-0001.
USCG-2005-20380-18

16 April 2005

Dear Sir or Madam,

On behalf of the 100,000 members and constituents of the International Wildlife Coalition (IWC) and the Whale and Dolphin Conservation Society (WDCS), I would like to offer the following comments regarding the US Coast Guard's (USCG) Port Access Route Study (PARS) to analyze potential vessel routing measures and consider adjusting existing vessel routing measures in order to reduce vessel strikes of the highly endangered North American right whale [Coast Guard docket number USCG-2005-20380].

First of all, IWC and WDCS appreciate the efforts by the USCG to pursue the enhanced protection of critically endangered North Atlantic (NA) right whales. NA right whales are the most critically endangered of all large whales and, according to the Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*), the *greatest known current cause of right whale mortality in the western North Atlantic is collision with ships* (NMFS 2003). The NOAA Fisheries Service acknowledges that the death of a single right whale each year, due to anthropogenic causes, may lead to the extinction of this species (SAR 2003). However, in the last 14 months alone, ship strikes have been implicated in the death or injury of at least four right whales, including three pregnant females (Table I). Additionally, ship strikes could not be ruled out as a cause of death for the two additional carcasses, which were located, but not retrieved (Table I). We believe that reducing the risk of ship strikes is essential to prevent extinction of this endangered species.

The IWC and WDCS commend the USCG for undertaking the PARS. However, we are concerned that little is being done in the interim to protect right whales from ship strikes. We believe that the United States has the authority and obligation to implement emergency regulations under the Ports and Waterways Act. We believe that the prioritization of Cape Cod Bay and the omission of the mid-Atlantic is inappropriate and in direct conflict with known ship-strike data. We do not feel that economic burden on the shipping industry is sufficient reason to avoid risk reduction measures. And, we encourage the USCG to use all available data collected through 2005, and consider that right whales may be more highly migratory than previously considered.

The United States had the authority and the obligation to regulate vessel traffic entering US ports which may harm North Atlantic Right Whales.

The USCG can, and should, immediately establish safety zones within 12 nautical miles of the coast and establish emergency regulations for waters of the EEZ under the Ports and Waterways Safety Act.

According to Title 33--Navigation and Navigable Waters Chapter I, Part 161_Vessel Traffic Management, regulations may be promulgated to enforce certain sections of The

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Ports and Waterways Safety Act (PWSA) using Vessel Traffic Services that will enhance **marine environmental protection** (emphasis added). District Commanders can establish safety zones and control the speed of the vessel, and the operating conditions, when transiting within the territorial sea (12nm from the coast). Additionally, Traffic Separation Schemes outside of the territorial sea can be temporarily adjusted by the USCG Commander in the case of an emergency.

(33CFR165.11) *Each District Commander may control vessel traffic in an area which is determined to have **hazardous conditions** (emphasis added), by issuing regulations:*

*(a) Specifying times of vessel entry, **movement** (emphasis added), or departure to, from, within, or through ports, harbors, or other waters (emphasis added);*

*(b) Establishing vessel size, speed (emphasis added), draft limitations, and **operating conditions** (emphasis added);*

(33CFR161.1, 33CFR160.5). *Vessel Traffic Services can be used to enhance the safe routing of vessels through congested waterways or **waterways of particular hazard** (emphasis added). Under certain circumstances, a VTS may issue directions to control the movement of vessels in order to minimize the damage to **the environment for marine environmental protection** (emphasis added) or take other action necessary for control of the vessel and the safetyof the **marine environment** (emphasis added).*

(33CFR160, 33CFR165.20). *Safety zones and regulated navigation areas. These zones and areas are created under the authority of the Ports and Waterways Safety Act, 33 U.S.C. 1221-1232. Safety zones established under 33 U.S.C. 1226 and regulated navigation areas may be established in waters subject to the jurisdiction of the United States as defined in Sec. 2.38 of this chapter, including the territorial sea to a seaward limit of 12 nautical miles from the baseline. A Safety Zone is a water area, shore area, or water and shore area to which, for safety or **environmental purposes** (emphasis added), access is limited to authorized persons, vehicles, or vessels. It may be stationary and described by fixed limits or it may be described as a zone around a vessel in motion.*

(33CFR167.5) *A traffic separation scheme or precautionary area in this Part may be temporarily adjusted by the Commandant of the Coast Guard in an emergency*

We believe that the current risk of vessel collision to right whales constitutes such an emergency, that an immediate action must be taken to prevent the extinction of the species. As stated previously, the leading cause of anthropogenic death to right whales is due to ship strikes (NMFS 2003). According to Moore et al (2004), almost three-quarters of the post-mortem findings for right whales that died in the northwest Atlantic between 1970 and 2002 indicated that vessel collisions were a contributing cause of death (in the cases where presumed cause of death could be determined). These data are likely to grossly underestimate the actual number of animals struck, as animals struck and lost at sea cannot be accounted for.

Limited information on whale/vessel collisions has shown increased severity of the strike based on speed. Whales that have been struck at speeds greater than 13kts were more likely to sustain fatal injuries, while whales struck at speeds less than 13 knots were more likely to survive (Laist et al 2001, Jensen and Silber 2003). Additionally, Butterworth et al. (1982) tested the impact of vessel speed and whale detection during a Southern

Hemisphere minke whale cruise. According to Buckland et al. (1993), the Butterworth study determined that the probability of detection [$g(0)$] was directly proportional to the speed of the survey vessel. Although Butterworth's study was inconclusive due to an insufficient number of sightings to accurately estimate [$g(0)$], Best (1982) summarized the Butterworth study stating "The chances of all the animals on a survey track line being seen (one of the critical assumptions of line transect theory) are therefore dependent on the speed of the surveying vehicle and the frequency with which the whales surface to breathe. Clearly, the faster the vehicle moves, and the more infrequently the whale surfaces, the greater the chances that not all of the animals on the track line will be detected."

We believe it is, therefore, imperative that emergency speed restrictions and routing measures are enacted immediately and we feel this can be accomplished through the Ports and Waterways Safety Act.

The prioritization of Cape Cod Bay, and the omission of the mid-Atlantic, in the proposed Port Access Route Study, is inappropriate.

According to the Federal Register notice, the PARS will focus on the *northern region first: first on Cape Cod Bay, and then, if it can be accomplished within the timeframe required by applicable legislation, the area off Race Point at the northern end of Cape Cod (Race Point) and the Great South Channel, and the southern region: Along the seacoast in the approaches to the Ports of Jacksonville and Fernandina Beach, Florida, and Brunswick, Georgia.*

While we appreciate that the study areas must be prioritized, we do not believe that the current plan is consistent with ship strike data which indicates that Cape Cod Bay, the primary focus of the PARS, has demonstrated the fewest number of ship-strike fatalities. According to data, risk is substantially higher in the Southeast and mid-Atlantic Regions. As a result, we are gravely concerned that the mid-Atlantic region is omitted from this initial study proposal and we believe the mid-Atlantic should be an area of priority for this study.

Of the 25 right whale ship collision records documented in Jensen and Silber (2003), the highest percentage (32%) of strikes was reported for the mid-Atlantic region (NY to NC), followed by the southeast (GA to FL), which accounted for 28% of total. In comparison, only two of the strikes (8%) were documented for Cape Cod Bay, including "Staccato," an animal found dead in Cape Cod Bay. However, the necropsy revealed that "Staccato" had survived the initial strike, which likely occurred 7-10 days prior to the discovery of her carcass and, as such, it is not known if the collision occurred in the Bay, or elsewhere.

The significance of the increased risk of ship strikes occurring in the mid-Atlantic is further reinforced by reviewing the Northeast Regional Stranding Network data for all large whales for the last four years (2000-2004). In the 24 cases where ship strike was suspected, 41% (10/24) were reported for the mid-Atlantic Region and, once again, only 8% (2/24) were reported for Cape Cod.

The current PARS proposal focuses only on the two major regions of right whale aggregation, but we ask the USCG to consider that right whales may be more highly migratory than accounted for in this plan. Tagging data obtained from entangled right whales demonstrate that animals are capable of traveling 50 miles per day. Whale #1102 traveled from the Gulf of Maine to the Gulf of St. Lawrence and back again, traveling

more than 3,800 miles in 75 days. In January of 2004, a right whale ("Kingfisher") was spotted off of Cumberland Island, Georgia. He was next sighted off of St. Augustine, Florida on March 17th entangled in fishing gear. At least some of the gear removed from the animal was inshore lobster gear from Maine. It is entirely possible that between January 30th and March 17th, "Kingfisher" traveled to Maine and back to Florida. Again, this increases the risk of collision in the migratory corridor.

Additionally, the lack of survey effort, and therefore sightings data, in an area should not be translated to mean the area is of minimal use, or importance, to right whales. Historical surveys in the southeast did not include much of South Carolina or northern Georgia. However, surveys conducted this past winter, covering the area from Myrtle Beach, SC down to Sapelo Island, GA culminated in roughly 40 sightings made up of about 45 individuals (including calves) (Glass, pers. comm.) These areas are not currently considered in the southeast portion of the proposed PARS.

Economic Impact to the Shipping Industry must not be prioritized when risk reduction measures are considered.

As stated in the Endangered Species Act of 1973, *The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable, give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity* (emphasis added) (16 USC 1533 (f)(1)(A)). The primary objective of the North Atlantic Right Whale Recovery Plan is to *minimize sources of human-caused death, injury, and disturbance* and the initial step is to *reduce ship collisions* (emphasis added) *with right whales*.

We acknowledge that vessel safety must be prioritized and support, whenever possible, minimizing impacts on vessel operations. However, while we appreciate that economic burdens may be placed on the shipping industry as a result of potential rerouting or speed reduction measures, we do not believe these impacts can take precedence over the pending extinction of that species. Under current conditions, including the present rate of anthropogenic causes of death (i.e. ship strikes), the extinction of the North Atlantic Right Whale has been predicted to occur within 200 years (Caswell et al. 1999).

We believe it is also important to consider the role of right whales in the ecosystem, the economic benefit of the survival of right whales, as well as the negative economic impacts that may result from their extinction. According to Charles Gilbert Gibbs, et al., *Petitioners v. Bruce Babbitt, Secretary of the Interior, et al* (2000):

*Finally, petitioners' demand for specific proof of the red wolf's near-term commercial importance ignores two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular species cannot always be easily determined at a given point in time. Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." National Ass'n of Home*

Builders, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of (1) the difficulty of identifying ex ante the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.

In Summary:

We feel the PARS is a critical step to further the conservation of the critically endangered North Atlantic right whale and we strongly commend the NMFS and the USCG for undertaking such measures. However, we also believe that the proposed study inappropriately prioritizes Cape Cod Bay over the southeast and omits the mid-Atlantic, an area of exceptionally high risk. We also believe that focusing solely on the two areas of known aggregation does not adequately consider the transitory nature of this species. We know that increased survey effort and telemetry and acoustical data continue to reveal the presence of whales in times and areas previously believed to be of minimal use. We believe that the United States has the authority and obligation to enact emergency regulations immediately and we strongly believe that economic impacts to the shipping industry must be considered secondarily to the conservation benefit to the species.

We appreciate the opportunity to comment and thank you for your time and consideration of our concerns.

Sincerely,



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Table I

Summary of 2004 and 2005 North Atlantic Right Whale Incidents

Compiled using data obtained from by the National Marine Fisheries Service Office of Protected Resources' Marine Mammal Health and Stranding Response Program, Northeast Regional Office, and Southeast Regional Office with Assistance from the Center for Coastal Studies and New England Aquarium.

Information Current as of April 17, 2005

Summary Table:

	Whale ID	Sex	Date	Location	Alive or Dead	Cause of Death
1	Unknown	Unknown	1/9/04	FL	Alive - Injured	N/A
2	Unknown; Stranding # EGNEFL0403	Male (calf)	2/3/04	FL	Dead	Unknown
3	1004 "Stumpy"	Female (adult; pregnant)	2/7/04	VA	Dead	Possible Ship Strike (skull fractures around the blowhole and ears, bruising around the blowhole, hemorrhage in the roof of the mouth)
4	3346 "Kingfisher"	Male	3/17/04	FL	Alive - Entangled	N/A
5	2320 "Piper"	Female	4/18/04	MA	Alive - Entangled	N/A
6	1424 (traveling with "Piper")	Unknown	4/18/04	MA	Alive-Entangled	N/A
7	3210	Unknown	5/19/04	MA	Alive-Entangled	N/A
8	1909	Female (adult; pregnant)	11/24/04	NC	Dead	Ship Strike
9	3314 "Yellowfin"	Unknown	12/6/04	NC	Alive - Entangled	N/A
10						
11	3120	Unknown	12/9/04	NC	Alive - Entangled	N/A
12						
13	2143 "Lucky"	Female (adult; pregnant)	1/12/05	GA	Dead	Suspected infection from wounds obtained as a result of previous ship strike
14	2301	Female (adult)	3/3/05	VA	Dead	Entanglement
15	2425	Female (adult)	3/10/05	GA	Alive-Injured	Ship Strike

Highlighted events indicate ship strike is known or suspected resulting in the death or injury of the animal.